Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

THE GOVERNMENT OF HONDURAS, and GUILLERMO CHIRINOS, Director General of Civil Aeronautics of the Republic of Honduras, individually,

Petitioners,

vs.

HONDURAS AIRCRAFT REGISTRY, LTD., a Honduran Corporation, and HONDURAS AIR REGISTRY BUREAU, LIMITED, a Bahamian Corporation,

Respondents.

THE GOVERNMENT OF HONDURAS, and GUILLERMO CHIRINOS, Director General of Civil Aeronautics of the Republic of Honduras, individually,

Petitioners,

vs.

OMEGA AIR S de RL,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 24.1.2, respondents, Honduras Aircraft Registry, Ltd. and Honduras Air Registry Bureau, Limited (collectively "HAR"), submit a Statement of the Case as HAR disagrees with Petitioners', the Government of Honduras ("Honduras") and Guillermo Chirinos (collectively "Honduras"), Statement of the Case in the Petition for Writ of Certiorari. Specifically, Honduras presents their Statement of the Case in an argumentative and distorted manner and they omit certain relevant facts while admitting that the facts are assumed as true on an appeal of a motion to dismiss.

The most glaring deficiency in Honduras' Statement of the Case is that it does not provide the terms of the contract sued upon, which are material to the immunity question before the Court. HAR also objects to the numerous references in Honduras' Statement of the Case that the contract at issue delegated "Government function[s]" to HAR by Honduras and that HAR "performed Government function[s]" of inspecting aircraft and issuing airworthiness certificates. The Eleventh Circuit concluded that HAR is not contending that the contract gave them the right to register aircraft (a sovereign act, or government function) and they are not bringing the lawsuit to obtain that right. *Honduras Aircraft Registry v. Government of Honduras*, 129 F.3d 543, 548 (11th Cir. 1997). Instead, HAR contracted to provide goods and services to Honduras in connection with its expanded civil air program by inspecting and certifying aircraft airworthiness so that Honduras would be able to appropriately register the aircraft under its flag. *Id.* HAR simply seeks to "enforce that contract." *Id.*

Honduras decided to set up a system of registering commercial aircraft that would be in compliance with international law and treaties; however, it lacked expertise in the field of aeronautics.

R1-1-3.[1] Honduras sought to contract with a company to perform the tasks of hiring and training inspectors, devising a database to register the aircraft, purchasing computer equipment and to perform other necessary tasks needed to establish a system for the registration of commercial aircraft. *Id.* This lawsuit involves the commercial contract entered into between HAR and Honduras. R1-1, at Att. "B" and "C" and R2-43-1. The contract provided for HAR to develop and maintain a commercial aircraft registration database and a system that would upgrade and modernize Honduras' civil air system. R2-43-1, 2; R1-1 at Att. "A". The contract arose out of negotiations with Honduras and Wayne J. Hilmer and Jorge Colindres, who is the President of Honduras Aircraft Registry, Ltd., a Honduran corporation fifty-one percent owned by Hondurans and forty-nine percent owned by Honduras Air Registry Bureau, Ltd., a Bahamian corporation. R2-34-1, 2. R2-34-2. The parties entered into negotiations with Honduran officials regarding Honduras' need to upgrade and modernize its civil aeronautics program and to comply with international aviation laws. R2-34-2. A petition was submitted by HAR to Honduras, providing, in part, that HAR would: 1) provide specialized services in developing the civil aviation authority to enable Honduras to develop an international civil aviation registry in accordance with international regulations; 2) provide for the inspection of aircraft and the issuance of technical aircraft certificates; and 3) promote the Honduran Registry in the United States and around the world. R2-34-2, 3.

On April 23, 1992, Honduras approved and ratified the proposed contract by issuing Accord 000818, a Presidential decree ("Decree"). R2-34-3. The contract was entered into on June 4, 1992 and provided that it was an agreement for "Technical Assistance between the Director General of Civil Aeronautics and Honduras Aircraft Registry Ltd." R1-1 at Att. B.

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[1]The record references are contained in the record on appeal with the Eleventh Circuit Court of Appeals.

The June 4, 1992 contract specifically required HAR to:

> Provide a center of computing and adequate installation for the airworthiness section, including computers, photocopiers, telex, typewriters and fax, development of necessary programs for the establishment of the data base with the information related with the aircraft to be inspected and that will be under the Honduran registry. To start, the equipment will be that which is necessary to manage the data of 100 aircraft and must provide additional equipment each time that the necessities of expansion require it. It is understood that this equipment will be permanently in communication with the principal data base managed in the Offices of the Inspector located in Miami, Florida, USA and will be accessed by modem.

R1-1 at Att. B. In furtherance of the contract, HAR would conduct aircraft inspections and issue certificates of airworthiness as provided by Honduran and international law. R2-34-3. The contract was modified and reaffirmed by agreement of the parties on December 16, 1993. R2-34-5; R1-1 at Att. "A" and "C".

As required under the contract, HAR provided the necessary equipment and economic assistance to effectuate inspections outside Honduras, maintained all communication equipment mentioned in the contract, employed four people in Key Largo, Florida, and established a computer center at HAR's offices in Key Largo, Florida where HAR hired and paid computer programmers to develop software for the Honduran government. R1-1 at Att. "A"; R2-34-5, 6.

Honduras is a signatory, as is the United States, to The Chicago Convention of the International Civil Aviation Organization ("ICAO"). The ICAO provides that contracting states, such as Honduras, can delegate authority to private entities to issue Certificates of Airworthiness on behalf of the government. R1-31 at

Att. A3 at pp. 18, 20 and 22. These private entities are Designated Airworthiness Representatives ("DARs"). R2-34-3. In the United States, these DARs are authorized by the Federal Aviation Administration ("FAA") to issue Certificates of Airworthiness after an inspection of the aircraft and to perform maintenance functions on behalf of the FAA. R2-34-4. To fulfill the contract at issue, HAR recruited DARs across the United States and in Europe. R2-34-4.

HAR performed inspections of aircraft to be registered by Honduras and collected fees from aircraft owners for the inspection and registration. R2-34-6. The consideration for HAR's investment, collection of fees, technical assistance and international promotion, was the right to inspect commercial aircraft for certification in Honduras and to charge a fee for this service to the owners of the aircraft. R1-1-6.

A change in the Honduran Government occurred in January 1994 and on August 11, 1994 Honduras invalidated the April 1992 Decree, without notice, causing the grounding of aircraft inspected by HAR. HAR filed suit against Honduras claiming that they fully performed under the contract, but Honduras breached the contract and was unjustly enriched because it failed to pay for the goods and services that were previously furnished under the contract. HAR also claimed that Guillermo Chirinos tortiously interfered with HAR's business relationships by communicating to third parties that the commercial and civil aircraft registered through HAR's efforts were not properly registered and that the contract with HAR was unlawful. R1-1-8, 12.

Honduras moved to dismiss the complaint under the Federal Sovereign Immunities Act ("FSIA"), for lack of personal jurisdiction, under the act of state doctrine and for *forum non conveniens*. R1-21. Respondent, Omega Air ("Omega"), intervened as a third party beneficiary of the contract. Omega alleged Honduras breached the contract, and tortiously interfered with advantageous business relations. Honduras also moved to dismiss Omega's complaint. Honduras' motions to dismiss were denied by the district court. The

Eleventh Circuit Court of Appeals agreed and held that based upon the commercial activity exception to the FSIA, Honduras is not immune from suit. The Eleventh Circuit remanded for the district court to apply the correct legal standard to the act of state doctrine and did not consider the *forum non conveniens* argument. *Honduras*, 129 F.3d 543.

REASONS TO DENY THE WRIT

I.
THE QUESTION PRESENTED TO THIS COURT IS NOT SUPPORTED BY THE RECORD AND WAS NOT AN ISSUE BEFORE THE ELEVENTH CIRCUIT COURT OF APPEALS.

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602, *et. seq.* ("FSIA"), provides the applicable guidelines for subject matter jurisdiction in this case. A foreign state is immune from the jurisdiction of the United States courts unless one of the statutory exceptions exist. 28 U.S.C. §§ 1604, 1605-07; *see Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). The commercial activity exception to foreign sovereign immunity, contained in section 1605(a)(2), provides, in relevant part, that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -
>
> ...
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United

> States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

28 U.S.C.A. § 1605(a)(2) (West 1994).

Honduras claims that the issue left open by this Court following the recent decisions in *Saudia Arabia v. Nelson*, 507 U.S. 349 (1993) and *Weltover*, 504 U.S. 607, is whether there is immunity for a sovereign act connected to a contract, where the contract contains both sovereign and commercial elements. However, in this case, HAR did not sue Honduras for the right to engage in sovereign acts and the contract at issue does not provide HAR with the right to perform sovereign acts. Instead, the contract provides for HAR's technical assistance in the development and maintenance of a commercial aircraft registration database.

Honduras' claim that HAR was provided the right to register aircraft under the contract is not supported by the record and has been consistently rejected. The Eleventh Circuit Court of Appeal expressly concluded that the contract between Honduras and HAR did not provide HAR with the right to register aircraft and HAR was not suing for that right. *Honduras*, 129 F.3d at 548. More to the point, the acts *sued upon* in this case are not sovereign acts, they are commercial acts. *Id.* In rejecting Honduras' contention that HAR sued Honduras for not performing a sovereign act under the contract, the Eleventh Circuit plainly stated that:

> Honduras ... argues that it would be impossible for a private person to contract with another private person to establish a government aircraft registry. Private entrepreneurs could not register aircraft under their own 'private' flag as Honduras can under the Honduran flag. It is not disputed that sovereign states have sovereign rights not only over their physical territory, but also in the airspace above. We agree

> that actually registering aircraft under the Honduras flag is an act peculiar to its sovereignty and cannot fall within the FSIA commercial activity exception. Plaintiffs, however, are not contending that the contract gave them the right to register aircraft, and they are not bringing this lawsuit to obtain that right. Instead, they contracted to provide goods, and services to Honduras in connection with its expanded civil air program by inspecting and certifying aircraft airworthiness so that Honduras would be able to appropriately register the aircraft under its flag. They merely seek to enforce that contract.

Id. As the Eleventh Circuit correctly concluded, and as supported by the record in this case, HAR sued Honduras to enforce the right to perform a commercial activity and not to perform a sovereign act. Thus, the acts sued upon are not "mixed" commercial and governmental acts; instead, the basis of HAR's complaint is Honduras' breach of the contract for goods and services. *See Nelson*, 507 U.S. at 357-58 (the court must focus on the particular conduct on which the action is based to determine if the commercial activity exception applies).

In sum, the question presented for review by Honduras (the undecided issue of whether a foreign sovereign is immune from suit where the acts sued upon are sovereign, but are connected to a contract that also has commercial elements) is one that was not before the Eleventh Circuit. Therefore, Honduras' petition for writ for certiorari should be denied.

II.

THE PETITION FOR CERTIORARI SHOULD BE DENIED AS THE CONTRACT DOES NOT PROVIDE FOR THE PERFORMANCE OF SOVEREIGN ACTS AND THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL IN DETERMINING WHETHER A SOVEREIGN IS IMMUNE FROM SUIT IN THE UNITED STATES.

Honduras' claim initially fails as it interprets a mixed commercial and sovereign case to exist when there are no sovereign elements to the contract at issue and HAR has not sued for the performance of sovereign acts. Honduras, similar to its arguments below, has confused the nature of the transaction with its purpose.

A commercial activity within the meaning of the FSIA is determined by reference to the nature of the conduct "rather than by reference to is purpose." *Weltover*, 504 U.S. at 614. A government is not immune from suit in the United States when there is nothing about the government's action (except for its purpose) that is not analogous to a private commercial transaction. *Id.* Likewise, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity as this type of "control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a commercial activity because private companies can similarly use sales contracts to acquire goods." *Id.* at 614-15.

Applying these principles to the facts of this case, the registration of aircraft by Honduras is an irrelevant factor to the question of the commercial activity at issue. Instead, "[w]hen Honduras commercially entered the market it did so as a private player to secure certain technical assistance and whatever else it needed to upgrade and expand its civil air program. Honduras did not enter the technical assistance market to regulate that market as a sovereign, but to participate in it as an individual could." *Honduras*, 129 F.3d at 548. Thus, this is not a mixed case of sovereign and commercial elements

in the contract sued upon and Honduras' registration of aircraft does not turn this commercial contract into a sovereign activity.

In a further attempt to obtain review by this Court, Honduras has strained the holdings from cases decided prior to this Court's decisions in *Weltover*, 504 U.S. 607, and *Nelson*, 507 U.S. 349. From pre-*Weltover* and *Nelson* decisions out of the Ninth and D.C. circuits, Honduras maintains that three tests exist for determining whether the FSIA applies in "mixed" commercial and sovereign cases: 1) the overall analysis test 2) the central prescription test; and 3) the activity in question test. These tests are either no longer valid, or have been further refined in light of *Weltover* and *Nelson*. Certiorari should not be granted based upon the perceived conflict arising from these purported tests, as identified by Honduras, in light of the holdings in *Weltover* and *Nelson*.

In *Weltover*, this Court held that the Republic of Argentina's default on certain bonds issued as part of an effort to stabilize its currency was an act taken in connection with a commercial activity. 504 U.S. at 617. In reaching this conclusion, the Court held that when a foreign government acts, not as a regulator of the market, but instead acts in the manner of a private player within the market, the sovereign's actions are commercial under the FSIA. *Id.* at 614. It is not the purpose (the reason why the sovereign state engages in the activity); instead, it is the nature (the outward form of the conduct that the foreign state performs or agrees to perform) that is the relevant inquiry in determining whether the commercial activity exception applies. *Id.* at 617. Shortly after the decision in *Weltover*, this Court clarified the focus of the relevant activity for purposes of the commercial activity exception by holding that the proper focus is on the conduct on which the cause of action is based and not on the motivation for the sovereign's acts. *Nelson*, 507 U.S. at 361. These decisions set forth the guiding principles for determining whether the action sued upon falls under the commercial activity exception.

Prior to the decision in *Weltover*, the court in *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1550 (D.C. Cir.

1987), held that it was the essence of the contract sued upon, or the basic exchange, and not the auxiliary features that determined if the relevant activity in question was commercial rather than governmental. Similarly, in *Millen Industries, Inc. v. Coordination Council for North Am. Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988), the court held that when a transaction involves both commercial and sovereign elements, jurisdiction under the FSIA depends on which element the cause of action is based upon. Both of these cases focused on the subject matter of the activity in question.

In contrast to the decisions in *Practical Concepts* and *Millen*, the proper analysis is set forth in this Court's decision in *Weltover*, which emphasizes the form of the transaction in question and not its subject matter. Joan E. Donoghue, *Taking the Sovereign Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 Yale J. of Int'l Law, 489, 509 (1992). Thus, there is no basis for Honduras' claim that there is a conflict among the circuit courts of appeal and that the Eleventh Circuit should have applied the central prescription test, or the activity in question test. Furthermore, the Eleventh Circuit properly applied the precedents in *Weltover* and *Nelson* in considering the nature of the act and the gravamen of the cause of action sued upon, and the court did not rely upon the overall activity of the transaction, as claimed by Honduras. *Honduras*, 129 F.3d at 548.

Another decision relied upon by Honduras for the argument that the circuit courts of appeal are split in their analysis of "mixed" commercial and sovereign activity is *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1328-29 (9th Cir. 1984). However, this decision is not at odds with the analysis applied by the Eleventh Circuit in this case. In *MOL*, the Bangladesh Ministry of Agriculture ("Bangladesh") granted MOL a ten year license to capture and export monkeys. MOL sued Bangladesh when it terminated the agreement. The Ninth Circuit held that Bangladesh was immune from suit as the contract concerned Bangladesh's right to regulate its natural resources, which was a uniquely sovereign function, and a private party could not have made such an agreement. *Id.* at 1329. Contrary to Honduras'

contention, the facts in *MOL* are starkly different from the facts in this case.

HAR has not sued Honduras for the right to perform a sovereign function -- instead, HAR has sued to enforce a contract for goods and services. Furthermore, each case must turn on its own facts in determining foreign sovereign immunity. *See Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F. 2d 1375, 1384 (5th Cir. 1992) ("courts faced with the question whether a particular act or series of acts constitutes commercial activity have ignored the ...[statutory definition of commercial activity] and have consistent with the intent of Congress, defined the concept on an evolving, case-by-case basis") (citing H. Rep. No. 94-1487, 94th Cong. 2d Sess. at 16, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615 (federal courts are given great latitude in determining what is a commercial activity)). In sum, each case turns on its own set of facts and based upon the vastly different facts in *MOL* as compared to the facts in this case, there is no basis for the assertion that there is a conflict between the Ninth and Eleventh Circuits when determining the commercial activity question under the FSIA.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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